No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a constitutional challenge to the data compensation and arbitration scheme of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 136a(c)(1)(D)(ii), was ripe for review in the absence of an allegation or showing that any of the plaintiffs had participated in and were harmed by an arbitration under the statute.

2. Whether, if we assume the issue is ripe, FIFRA's data compensation and arbitration provisions violate Article III of the United States Constitution because the awards made by the arbitrators selected under the statute are subject to review by an Article III court only on a showing of "fraud, misrepresentation or other misconduct," 7 U.S.C. 136a(c)(1)(D)(ii).

3. Whether, if we assume the issue is ripe and these provisions violate Article III, the plaintiffs were entitled to a judgment invalidating the entire scheme for consideration of previously submitted data rather than a judgment striking the limitation on judicial review.

PARTIES TO THE PROCEEDING

In addition to those named in the caption, the parties are: Abbott Laboratories, Ciba-Geigy Corporation, E.I. duPont De Nemours Company, Rhone-Poulenc, Inc., Rohm and Haas Company, Uniroyal, Inc., Zoecon Corporation, Stauffer Chemical Corporation, FMC Corporation, and Velsicol Chemical Corporation. The following companies, originally parties to this action, were dismissed prior to final judgment: Ralston Purina Company, Salisbury Laboratories, Inc., Sandoz, Inc. and Upjohn Company.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-14a) is reported at 571 F. Supp. 117.

JURISDICTION

The judgment of the district court (App., *infra*, 15a-16a) was entered on November 30, 1983. The Administrator of the Environmental Protection Agency filed a notice of appeal to this Court on December 21, 1983 (App., *infra*, 17a-18a). On February 13, 1984, Justice Marshall extended the time for docketing the appeal to March 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 1, of the United States Constitution and the relevant portions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*, are reprinted in App., *infra*, 19a-22a.

STATEMENT

1. The court below declared unconstitutional a key provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, the federal legislation regulating the marketing and use of pesticides.[1] Under FIFRA, persons seeking to market a pesticide product in the United States first must obtain a registration from the Environmental Protection Agency (EPA). 7 U.S.C. 136a(a). Before issuing the registration, the Administrator of EPA must determine, inter alia, that the pesticide's use will not cause unreasonable adverse effects on the environment, taking into account the benefits as well as the risks to humans or the environment. 7 U.S.C. 136(bb), 136a(c)(5)(C)-(D). The Administrator bases this determination, in part, on test data submitted or cited by the applicant for registration, data that generally include information on the chemical nature and structure of the pesticide as well as test results on the potential dangers of the product. Section 3(c)(1)(D) of FIFRA permits EPA to consider certain categories of health and safety data submitted by one applicant in support of the application of another company. 7 U.S.C. 136a(c)(1)(D). That

[1] A similar challenge to this statute is currently pending in this Court in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (argued Feb. 27, 1984).

Section also provides that the later applicant, in order to cite the data, must offer to compensate the original submitter; if the parties cannot agree on the amount of compensation, either may initiate binding arbitration proceedings. The decision of the arbitrator may be reviewed only upon a showing of "fraud, misrepresentation, or other misconduct" (*ibid.*).

In the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 (1978 Amendments), Congress modified FIFRA's registration scheme [2] in order to promote competition and to eliminate needless duplicative testing. Under the 1978 Amendments, applicants are granted a 10-year period of exclusive use for data on new active ingredients contained in pesticides registered after September 30, 1978. § 3(c)(1)(D)(i), 7 U.S.C. 136a(c)(1)(D)(i). All other data submitted after December 31, 1969, may be cited and considered in support of another application for 15 years following the original submission if the applicant offers to compensate the original submitter. § 3(c)(1)(D)(ii), 7 U.S.C. 136a(c)(1)(D)(ii). Data that do not qualify for either the 10-year period of exclusive use or the 15-year period of compensation may be considered by EPA without limitation. § 3(c)(1)(D)(iii), 7 U.S.C. 136a(c)(1)(D)(iii).

Congress also modified the compensation provisions, changing significantly EPA's role in the scheme. Unlike the prior statutory regimen, in which EPA decided the amount and terms of compensation when the data submitter and the subsequent applicant could not agree,

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[2] The prior statutory history is discussed in our brief in *Monsanto* (at 3-11) No. 83-196. A copy of that brief is being served on counsel for appellees.

the revised statute provides that either party may initiate arbitration proceedings by asking the Federal Mediation and Conciliation Service to designate an arbitrator. § 3(c)(1)(D)(ii), 7 U.S.C. 136(c)(1)(D)(ii). The statute further provides that the "findings and determination of the arbitrator shall be final and conclusive" and not subject to judicial review "except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator" (*ibid.*).[3]

2. Several large pesticide firms brought this action in 1976 in the United States District Court for the Southern District of New York, challenging the constitutionality of the disclosure provisions of FIFRA, as amended in 1972 and 1975. Following the 1978 Amendments, appellees amended their complaint to allege that both the data consideration and data disclosure provisions took their property in violation of the Fifth Amendment and deprived them of their property without due process of law. The district court granted appellees' motion for a preliminary injunction with respect to all data submitted prior to the enactment of the 1978 Amendments. *Amchem Products, Inc.* v. *Costle*, 481 F. Supp. 195 (S.D.N.Y. 1979). The Second Circuit reversed, however, concluding that appellees had failed to show a likelihood of success on the merits, and this Court denied a petition for a writ of certiorari. *Union*

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[3] Section 3(c)(1)(D)(ii) also provides for sanctions for parties who do not cooperate with the arbitration scheme. If an applicant fails to comply with the terms of a compensation agreement or an arbitration award, its registration is subject to cancellation; if a data submitter fails to participate or otherwise comply, it forfeits its right to compensation (7 U.S.C. 136(c)(1)(D)(ii)).

Carbide Agricultural Products Co. v. *Costle*, 632 F.2d 1014 (1980), cert. denied, 450 U.S. 996 (1981).

Following that round of litigation, appellees stipulated to dismissal with prejudice of their taking claims and their due process claims as to the data consideration provisions. Thus, two contentions remained: (1) that the disclosure provisions, as applied to data submitted prior to 1978, violated due process, and (2) that the arbitration and compensation provisions were an unconstitutional delegation of legislative authority. After this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), appellees maintained that the arbitration and compensation scheme violated Article III of the United States Constitution because the statute impermissibly assigned judicial functions to the arbitrators and limited judicial review.

The district court granted appellees' motion for summary judgment on their Article III claim (App., *infra*, 15a).[4] The court first rejected the government's contention that any challenge to the compensation and arbitration scheme was not ripe for review until a party had suffered harm from the results of a specific arbitration (App., *infra*, 10a n.2). In the court's view, there was no advantage in delaying resolution of the issue; the mere "statutory compulsion to seek relief through arbitration" was sufficient to create a concrete case or controversy (*id.* at 11a n.2). On the merits, the court agreed with appellees' contention (*id.* at 13a) that the arbitra-

[4] The court rejected appellees' due process claim against the retroactive application of the disclosure provisions (App., *infra*, 9a).

tion scheme "impermissibly intrudes on areas of decisionmaking constitutionally entrusted to the judiciary," relying on this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*. Because the statute barred Article III courts from reviewing the arbitrator's decision except for "fraud, misrepresentation, or other misconduct," there was, in the court's view, an "absolute assignment of power" to the arbitrators that violated Article III (App., *infra*, 13a).

On the basis of this holding, the district court entered a broad injunction (App., *infra*, 15a-16a). Rather than striking down merely the limitation on judicial review of the arbitrator's decision, the court declared the entire compensation and arbitration scheme unconstitutional (*ibid.*). Further, the court enjoined the Administrator from "permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D)," save when the original data submitter consents to the use of such data (*ibid.*). As a result, the effect of this order is to invalidate all of Section 3(c)(1)(D)(ii), providing for the consideration of data in the 15-year period following their submission.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The district court has enjoined enforcement of a key provision of FIFRA that effectuates Congress's express intent that the pesticide registration program become more efficient and that competition in the industry be increased. Because the court apparently viewed the arbitration procedures as an integral part of the data consideration provisions, the judgment prevents EPA from granting registrations based on previously

submitted data without the permission of the firm that submitted the data. It thus invalidates the heart of the comprehensive scheme created by Congress in its effort to weigh the need for increased competition and the need for innovation in the pesticide industry. The injunction here is nearly as broad as that entered in *Monsanto*. Here, as in *Monsanto*, if the decision is allowed to stand, Congress's desire to encourage competition in the pesticide industry and avoid unnecessary duplication of testing will be thwarted.

All the issues presented here are also under consideration in *Monsanto*. In that case, we have appealed from a district court judgment declaring that FIFRA's data disclosure and consideration provisions take Monsanto's property in violation of the Fifth Amendment (83-196 J.S. App. 41a). The district court in *Monsanto* also held that the compensation and arbitration scheme violated Article III (*id.* at 34a-35a, 41a). The decision below is no more correct than the opinion under review in *Monsanto*. First, the court erroneously held that the challenge to the arbitration scheme was ripe for review, despite the fact that no concrete case involving the results of an arbitration was presented. Second, the district court's decision on the merits ignores this Court's decisions approving the use of mandatory arbitration schemes that afford limited judicial review. Third, the relief is far broader than the holding required, and has the effect of invalidating not only the arbitration provisions, but also a critical part of the overall regulatory scheme. Consequently, this case should be held pending the decision in *Monsanto* and disposed of in accordance with that decision.

1. The challenge to the constitutionality of the arbitration and compensation scheme was premature since none of the appellees alleged or established that it had been injured by an actual arbitration under the statute. In these circumstances, the issue was not ripe for review. Ripeness is a threshold element of Article III's requirement of a case or controversy. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). Accordingly, federal courts are without jurisdiction to adjudicate hypothetical disagreements or abstract claims before action has been taken that has a concrete effect on an aggrieved party. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967); *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 164 (1967). To determine if a question is ripe for review, the Court must consider the "fitness of the issues for judicial decision" and weigh that consideration against "the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. at 149.

In this case, the asserted claims of unconstitutionality are premature in the absence of a specific arbitration award to review. The statute itself inflicts no harm on the plaintiffs, and the likelihood of injury is wholly speculative at present since appellees would suffer concrete injury only after a series of discrete, independent events. First, a company must apply for a registration based on data submitted by one of the appellees and compensable under Section 3(c)(1)(D). Next, EPA must decide to grant the registration, the company must offer to compensate the data submitter, the parties must disagree, and arbitration must be initiated and com-

pleted with an award. At any stage, the appellees' statutory right to compensation may not mature or may be fully satisfied. No immediate injury is caused by enactment of the statute; the many possible contingencies show that the claimed injury is entirely speculative. See *Toilet Goods Association* v. *Gardner*, 387 U.S. at 163-164.[5]

Precisely the same considerations led this Court to dismiss as premature a similar attack on a statutory requirement for binding arbitration in *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 304-305 (1979). In that case, an Arizona statute required binding arbitration of a labor dispute between farm workers and agricultural employers if there was a strike and if the employer responded by obtaining a temporary restraining order enjoining the strike. This provision was alleged to violate due process and the constitutional right to a jury trial. The Court held that so long as there was a possibility of settling such disputes through

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[5] One of the appellees, Stauffer Chemical Corporation, had, by the time of decision below, in fact been a party to an arbitration under the statute. The arbitrator awarded to Stauffer not only a share of the data development costs but also compensation based on the subsequent registrant's product sales. But there was no allegation in the present case that Stauffer had been injured by the arbitration process nor did the complaint here seek review of the award. Rather, the other party to the arbitration, PPG Industries, has attacked that award as excessive and has claimed that Section 3(c)(1)(D) is unconstitutional under the Due Process Clause, the Taking Clause and Article III. *PPG Industries, Inc.* v. *Stauffer Chemical Co.*, Civil Action No. 83-1941 (D.D.C. filed July 7, 1983). Stauffer Chemical Corporation, an appellee in the instant case, has counterclaimed in that action for enforcement of the award, and has cross-claimed in the alternative against EPA as a defendant for a declaration that the statute violates Article III and the Fifth Amendment.

negotiation and without the need to invoke the challenged arbitration procedures, "any ruling on the compulsory arbitration provision would be wholly advisory." 442 U.S. at 305.

In addition, there is no hardship in withholding judicial review at this time. If and when any of the appellees receives an award that, in its view, is inadequate and illegal, the company may bring an action to challenge the award and present its constitutional claims in that proceeding.[6]

Precisely the same issue is presented in *Monsanto*. There, as here, the plaintiff had not alleged any injury from a specific arbitration. Thus, the government argued (83-196 Gov't Br., at 44-47) that the questions were premature and Monsanto has conceded in its brief that they were not ripe for review (83-196 Monsanto Br., at 40 n.56). No different result should obtain here.

2. Even if this claim were ripe for review, the district court erred on the merits. Binding arbitration of statutorily created entitlements does not offend any requirement of procedural due process. *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U.S. 151, 157-158 (1931) (state statute mandating arbitration of the amount of loss under insurance policy). See *Crane* v. *Hahlo*, 258 U.S. 142 (1922) (damage awards for municipal construction work reviewable only for jurisdictional defects, fraud, or willful misconduct). See also *Andrews* v. *Louisville & N. R.R.*, 406 U.S.

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[6] As noted above, see note 5, *supra*, one such proceeding is currently pending in the United States District Court for the District of Columbia. It was not brought by Stauffer, an appellee here, but by the losing party in the arbitration, PPG Industries.

320 (1972); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123 (3d Cir. 1969); *Edwards* v. *St. Louis-S.F.R.R.*, 361 F.2d 946 (7th Cir. 1966).

Contrary to the district court's holding, FIFRA does not offend Article III by assigning the resolution of a compensation dispute to an arbitrator whose decision is subject to limited judicial review. This Court has upheld laws that "withdr[e]w judicial review of administrative determinations in numerous cases involving the statutory rights of private parties." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 333 (1966). See *Switchmen's Union* v. *National Mediation Board*, 320 U.S. at 300-301, 303. Moreover, this Court's recent decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), is not to the contrary. The vice of the 1978 Bankruptcy Act was the assignment to the bankruptcy courts of the authority to adjudicate traditional common law rights (*id.* at 81-86); the challenged provisions of FIFRA deal only with a statutorily-created right of recent vintage. Indeed, the plurality in *Northern Pipeline* reaffirmed Congress's constitutional authority to proceed in this manner (458 U.S. at 83) (footnote omitted)):

> [W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.

Thus, the court below erred in relying on *Northern Pipeline* to strike down the arbitration provision.

3. Finally, even if the statutory provision had correctly been found to violate Article III, that conclusion would not justify enjoining the operation of Section 3(c)(1)(D)(ii) in its entirety. On the contrary, the only appropriate relief would be to strike down the limitation on review by an Article III court, since there can be no doubt that the scheme would be constitutional so long as full judicial review was available. See *Northern Pipeline*, 458 U.S. at 83; *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932). See also *United States* v. *Raddatz*, 447 U.S. 667, 682-683 (1980); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 53 (1936).

The district court's apparent conclusion that the limitation on judicial review was integral to the operation of the data consideration, compensation and arbitration scheme cannot be sustained. Whether a statute or any of its provisions should be viewed as inseparable is a matter of Congressional intent. *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976); *Tilton* v. *Richardson*, 403 U.S. 672, 682-684 (1971); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938). Here, Congress has plainly spoken. The statute provides that the invalidity of "any provision * * * or the application thereof * * * shall not affect other provisions or applications" (7 U.S.C. 136x). The achievement of the primary purpose of Section 3(c)(1)(D)(ii), to permit consideration of previously-submitted data and to provide a compensation mechanism for that use of the data, is not dependent on the limitation on judicial review, and there is nothing in the legislative history to suggest that Congress would have failed to enact the provision without such a limitation. The district court, therefore, failed to

fulfill its duty "to save and not to destroy" the remaining portions of the statute. *Tilton* v. *Richardson*, 403 U.S. at 684, (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

CONCLUSION

This case should be held pending the decision in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196, and disposed of in accordance with that decision.

Respectfully submitted.

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MARCH 1984

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL., PLAINTIFFS,

against

WILIAM D. RUCKLESHAUS, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

July 28, 1983

OPINION AND ORDER

OWEN, District Judge

This action arises out of a challenge to the constitutionality of certain aspects of the 1978 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. Specifically, plaintiffs object to the requirement that they disclose their testing data to the public (the "disclosure" provisions) and a second requirement that allows competitors to use such data in support of their own pesticide registrations (the "use" provisions). Defendant is the administrator of the United States Environmental Protection Agency (the "EPA"). The parties are presently before me on cross-motions for summary judgment. Before I turn to the merits, a review of the statutory history is appropriate.

In 1947, Congress enacted the forerunner of today's FIFRA. At inception, the statute simply required the developer or manufacturer of a pesticide to register its product with the Secretary of Agriculture prior to

introducing it into the marketplace. The registration process itself was relatively straightforward. An applicant was required to file its name and address, the name of the pesticide to be registered, a complete copy of the labeling and a statement of the claims made for it, including directions for use, and, if requested by the Secretary, a full description of the tests made and the results upon which any claims were based. The Secretary was also vested with the power to require an applicant to submit the complete formula of its pesticide. If it appeared that its composition was such as to warrant the proposed claims made for it and if it otherwise conformed with the requirements of FIFRA, after reviewing the data submitted the Secretary registered the pesticide. If the Secretary was dissatisfied with the application, the applicant would be provided with notice and an opportunity to correct its deficiencies.

FIFRA was substantially revised in 1972:

> as a response to growing public concern about public health and ecological effects of pesticides. The new FIFRA provided for a more complete registration process and stronger enforcement measures, and heralded a policy of thorough scientific analysis of pesticide chemicals before making them available to the public. Now ... not only does an applicant for registration have to show his pesticide's composition is such as to warrant the proposed claims made for it and that its labeling and other submitted materials comply with the Act before he may obtain a registration but the EPA must also determine that the pesticide will perform its intended function without unreasonable adverse effects on the environment, and that, when used in accordance with widespread and commonly recognized practice, it will not generally cause adverse effects on the environment.

Mobay Chemical Corp. v. Costle, 517 F.Supp. 254, 258 (W.D.Pa. 1981) *aff'd in part sub. nom. Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419 (3rd Cir. 1982).

The 1972 amendments still required persons applying to register pesticides to submit extensive testing data in support of their registrations but allowed them to retain certain proprietary rights in their data even after submission. To this end, former section 10(a) permitted data submitters to designate portions of their data as either trade secrets or commercial or financial information, and former section 10(b) prohibited the EPA from disclosing those portions.

The 1972 amendments also allowed data submitters certain rights of compensation. Thus, the EPA was prohibited from using publicly available data it had received in support of one pesticide registration to support the registration of another pesticide unless the subsequent data user first offered to pay reasonable compensation to the original data submitter. Where possible, the level of compensation was to be negotiated by the original data submitter and the data user. Where agreement could not be reached, the EPA retained the power to set the level of compensation. The original data submitter, however, retained the right to appeal this determination to the federal district court.

Such a compensated use program had benefits for both the EPA and for registrants. It increased administrative efficiency by allowing the EPA to rely on already approved testing techniques and it benefited original data submitters by mandating compensation when their data was used by another registrant.

The 1978 amendments to FIFRA were enacted in response to certain problems which had arisen following

the enactment of the 1972 revisions. Among these difficulties was the practice adopted by many data submitters of designating large portions of their data as "trade secret" material in order to avoid subsequent disclosure. Obviously, this tactic precluded the EPA's use of their data to support the registrations of competing pesticide manufacturers. As a result, the trade secret provisions both limited the EPA's efficient management of its registration process and undercut the compensation program envisioned by the drafters.

Pursuant to the 1978 amendments, all applicants are no longer required to make the extensive filings previously mandated. Rather, applicants must now file either "a full description of the tests made and the results thereof upon which the claims are based or, alternatively, a citation to data that appear in the public literature or that previously had been submitted to the Administrator. . . ." 7 U.S.C. § 136a(c)(1)(D).

Moreover, although the original data submitter still retains certain proprietary rights in the data which it has submitted, those rights have been significantly altered. New section 3(c)(1)(D) no longer permits a data submitter to invoke trade secret protection. 7 U.S.C. § 136a(c)(1)(D). Rather, it divides all submitted data into three parts. Thus,

> (1) *with respect to pesticides containing active ingredients that are initially registered after September 30, 1978*, the original data submitter is entitled to a period of exclusive use of that data for registration purposes for a period of 10 years;
>
> (2) *with respect to data submitted after December 31, 1969 and not subject to the exclusive use provisions set forth above*, the EPA may use such data in its consideration of the registration applications

of applicants other than the original data submitter for a period of 15 years if the applicant has made an offer to compensate the original data submitter. The terms and amounts of compensation are to be set by the parties themselves. Should they fail to reach agreement on compensation, either party may initiate binding arbitration proceedings. The arbitrator's findings and determinations are not reviewable by the federal courts except for fraud, misrepresentation, or other misconduct; and

(3) *with respect to data which is not subject to either the exclusive or the compensated use provision*, the EPA may use data provided by an original data submitter in support of the registration of another applicant without the permission of the original submitter and without an offer of compensation being made.

In sum, the new program allows the developer of new "active ingredients" the exclusive use of its data for a period of ten years and compensated use for a period of five years following the termination of the exclusive use period. It allows registrants of data not qualifying for a period of exclusive use a fifteen-year period of compensated use. And finally, it provides for neither exclusive nor compensated use fifteen years after registration.

In addition to these new use provisions, the 1978 amendments impose new disclosure requirements on registrants. As I mentioned above, under the earlier law registrants were allowed to shield much of their filed data by designating portions thereof as trade secrets. The new section 10(d), 7 U.S.C. § 136h(d), "authorizes the public disclosure of all information concerning the objectives, methodology, results, or significance of any test performed on or with a pesticide, and of any residue, environmental chemistry, safety, toxicology, metabolism, and fish and wildlife data." *Mobay Chemi-*

cal Corp. v. Costle, supra, 517 F.Supp. at 260. Three significant classes of information, however, remain protected from disclosure "unless the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk, or injury to health or environment," 7 U.S.C. § 136h(d)(1):

> (A) [information that] discloses manufacturing or quality control processes,
>
> (B) [information that] discloses the details of any methods for testing, detecting, or measuring the quantity of any deliberately inert ingredient of a pesticide, or
>
> (C) [information that] discloses the quantity of any deliberately added inert ingredient of a pesticide.

7 U.S.C. § 136h(d)(1). The use of data made available pursuant to this section for purposes of registration is governed by § 3(c)(1)(D), as set forth above.

In their complaint, plaintiffs attack two aspects of the 1978 FIFRA amendments. First, plaintiffs challenge new section 10 of FIFRA, 7 U.S.C. § 136h—the "disclosure" provision—which allows the EPA to disclose certain information to the public which had been submitted by plaintiffs prior to 1978 and which prior to that date had been insulated from public disclosure by the trade secret protections of the predecessor act. Plaintiffs contend that this disclosure provision is a retroactive deprivation of plaintiffs' property rights in their trade secret data in violation of due process of law. Second, plaintiffs challenge new section 3(c)(1)(D) of FIFRA, 7 U.S.C. § 136a(c)(1)(D)—the "use" provision—which permits the compensated use of plaintiffs' research data by other registrants to support their own federal pesticide registrations. Plaintiffs contend that the compensated use requirement, coupled with the particular arbitration remedy provided in the statute, is improper as an unconstitutional delegation of legislative

power to the private arbitrators and, alternatively, is a violation of the Constitution insofar as it deprives the judiciary of its traditional Article III function.

Defendant, by its cross-motion for summary judgment, contends that these sections withstand constitutional scrutiny. I first consider the "disclosure" provisions before turning to the "use" section.

The Disclosure Requirement[1]

As the preceding discussion indicates, prior to 1978, after submitting data in support of their products, pesticide registrants could then designate certain portions of their submissions as trade secret material. Once so designated, data was protected from disclosure by former section 10(b). The 1978 amendments, however, introduced a new program which strongly favors disclosure. Pursuant to new section 10(d), "all information concerning the objectives, methodology, results or significance of any test or experiment" submitted in support of a registration is subject to disclosure except insofar as that information may be protected by certain narrowly drawn exceptions. Thus, the new program affects all data in one of two ways. As to data submitted after the passage of the 1978 amendments, pesticide registrants are on notice that they are relinquishing their expectations to trade secret protection except as narrowly preserved by the statute itself. As to data submitted prior to 1978, the amendments operate more onerously. The expectation fostered by the pre-1978

[1] Plaintiffs have requested that the court postpone determination of this aspect of the motions because of the pendency of proposed legislation which would restructure the disclosure provisions in the statute. Insofar as that legislation does not appear to be substantially closer to enactment today than it was on the day that plaintiffs first made their request, that application is denied.

statute that data designated as trade secret material will be withheld from public disclosure no longer obtains. Only so much of the once-protected data as falls within the statutory exception remains protected from disclosure. The rest, even though it was once secret and even though it may have been submitted with the expectation that it would not be disclosed, is publicly available.

Plaintiffs challenge the retroactive effect of the 1978 amendments to section 10, 7 U.S.C. § 136h(d), and claim that the pre-1978 statute created the expectation that data designated "trade secret" would be preserved from disclosure and that this expectation fostered by statute constituted a "vested right." Plaintiffs further contend that the retroactive deprivation of this expectation divests them of their property without due process of law. They contend in addition, that this "retroactive application is so harsh and oppressive as to transgress the constitutional [due process] limitation." *Welch v. Henry*, 305 U.S. 134, 147 (1938).

Plaintiffs do not contest the new disclosure requirements as they apply to data submitted after the enactment of the 1978 amendments. As the Supreme Court commented in an analagous context:

> [I]t is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealings, to require that the nature of the product be fairly set forth.

Corn Products Refining Co. v. Eddy, 249 U.S. 427, 431-32 (1919); *see, also, National Fertilizers Ass'n v. Bradley*, 301 U.S. 178 (1937). "Further, [l]egislative acts adjusting the burdens and benefits of economic life

come ... with a presumption of constitutionality, and ... the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Even legislation that has retroactive applicability "is not unlawful solely because it upsets otherwise settled expectation." 428 U.S. at 16. "The retroactive aspects [however] must meet the test of due process, and the justifications for the latter may not suffice for the former." 427 U.S. at 17. Thus, the constitutionality of the disclosure provisions must be judged by the standard due process test. If the challenged legislation bears a rational relation to the evil which it seeks to remedy, I may look no further. *Williamson v. Lee Optical Co.*, 348 U.S. 487 (1955).

I conclude that the disclosure requirements embodied in section 10(d), 7 U.S.C. § 136h(d), are neither arbitrary nor irrational. FIFRA was revised in 1972 to accommodate the increasing public interest in the regulation of products which affect the environment with the interest of pesticide manufacturers in protecting costly research data from acquisitive competitors. FIFRA was amended again in 1978 to adjust the balance struck in 1972 when it became apparent that the statutory goal of granting the public access to the data from which they could conduct their own evaluations of new pesticides fell short of achievement by reason of registrants' ability to designate certain portions of their data as trade secrets. That the amendments could have been better drawn or if they upset settled expectations, is of no consequence. The Constitution does not require perfect economic regulation. It only requires that legislation not be arbitrary or irrational. The disclosure provisions meet that standard. Defendant's motion for summary judgment on this issue is therefore granted.

The Compensation-Arbitration Provisions[2]

Plaintiffs also challenge the compensation provisions of the amended statute. Section 3(c))1)(D), 7 U.S.C.

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[2] Defendant contends that plaintiffs' challenge to the arbitration provisions in FIFRA are premature and that plaintiffs lack standing. I disagree and hold that they have presented a justiciable "cause or controversy."

In order to demonstrate standing, a claimant must show "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Duke Power Co. v. Caroline Environmental Study Group*, 438 U.S. 59, 79. That second component may also be determiend by resolving "whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Assocation of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

In this instance, the inquiry therefore focuses on whether plaintiffs are suffering injury in fact by the operation of the arbitration requirements and whether "there is a 'substantial likelihood' that the relief requested will redress the injury claimed." *Duke Power Co. v. Caroline Environmental Study Group*, 438 U.S. at 75 n.2. Plaintiffs here would describe their alleged injury in terms of the statutory compulsion to participate in an arbitration procedure that is void *ab initio* as a matter of law and the deprivation thereby of any access to meaningful compensation for the use of their data by subsequent registrants. The Constitution requires only that the plaintiffs allege a "distinct and palpable injury" to satisfy the first component of the test. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The compulsion to arbitrate satisfies that component. Moreover, the second component is more easily satisfied. Where the Constitution requires only "a 'fairly traceable' causal connection betwen the claimed injury and the challenged conduct," *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. at 72, *quoting Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 21 (1977), plaintiffs' injuries here would be the direct product of the statutory plan. Plaintiffs are clearly within the zone of interest regulated by the use provisions.

Defendants also contend that plaintiffs' challenge to arbitration is not yet ripe for judicial review, *i.e.*, whether an abstract or a concrete question is before the court. "The difference be-

§ 136a(c)(1)(D),[3] the focus of plaintiffs' complaint, calls for the data user, in the first instance, to make a com-

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tween an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Babbit v. United Farm Workers*, 442 U.S. 289, 297 (1979). Here that question is best settled by inquiring into what profit there would be in the court's waiting for a later date. Defendant contends that this action will not be ripe for resolution until arbitration has produced results unfair to plaintiffs or at least until arbitration has been commenced. Nevertheless, it is not the results of any arbitration procedure that plaintiffs protest, or even the internal procedure thereof, rather it is the statutory compulsion to seek relief through arbitration to the exclusion of any other mechanism. That issue is clearly ripe for resolution.

[3] Section 3(c)(1)(D) states, in pertinent part:

> Each applicant for registration of a pesticide shall file with the Administrator a statement which includes . . .
>
> (D) . . . a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:
>
> (i) With respect to pesticides containing active ingredients that are initially registered under this subchapter after September 30, 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not without the written permission of the original data submitted, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide:
>
> Provided, That such permission shall not be required in the case of defensive data;
>
> (ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintian in effect an existing registration, or for re-registration, the Administrator may, without the permission

pensation offer. If the data submitter does not accept that offer within 90 days and the parties have not agreed on a procedure to determine compensation, either the data user or the data submitter may then initiate binding arbitration proceedings. The statute, however, sets no guidelines or standards for the fixing of compensation. Moreover, it provides that 'the findings and determination of the arbitrator shall be final and conclusive" and that

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of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the "applicant") within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data sumitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagrah. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determinaton of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct.

> no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator. . . .

Plaintiffs challenge the constitutionality of this provision on two grounds.[4] First, they contend that the compensation-arbitration procedure is an unlawfully overbroad delegation because it (1) contains no standards for decision-making, (2) fails to set forth any system through which coherent standards can be developed, and (3) restricts sufficient access to judicial or administrative review. *See Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). And second, they contend that the arbitration-compensation procedure impermissibly intrudes on areas of decision-making constitutionally entrusted to the judiciary. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___ U.S. ___, 50 U.S.L.W. 4892 (June 28, 1982). While plaintiffs appear correct in their contention that this is a standardless delegation of powers, what is dispositive here is the fact that the proposed arbitration procedure commits to arbitrators the power to resolve valuation issues utterly without judicial review. This

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[4] "Courts confronted with the questions whether there is a property right in submitted testing data and whether, if there is, the statutory program constitues a "taking" have reached differing conclusions. *Compare Monsanto Company v. Acting Administrator*, No. 79-366 C. (E.D. Mo. April 19, 1983, *with Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419 (3rd Cir. 1982), *affirming in part, Mobay Chemical Corp. v. Costle*, 517 F.Supp. 254 (W.D.Pa. 1981), *with Petrolite Corp. v. EPA*, 519 F.Supp. 996 (D.D.C. 1981); *cf., Union Carbide Agricultural Products Co., Inc. v. Costle*, 632 F.2d 1014 (2d Cir. 1980).

absolute assignment of power to arbitrators is an impermissible intrusion on the judiciary.

In *Northern Pipeline*, the Supreme Court held that although the Congress possesses substantial discretion to create substantive federal rights and to tailor the manner in which they may be adjudicated, including the assignment to an adjunct of some functions historically performed by judges . . . [,] the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." 50 U.S.L.W. at 4900. There can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation. *Accord, Monsanto Company v. Acting Administrator*, No. 79-366C (E.D. Mo. April 19, 1983).

The use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compenstion to data submitters. The courts play no role in fact-finding. More importantly, however, they are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding. Rather, their powers are limited to review for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator." This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III.

Submit order on notice effectuating the foregoing.

/s/ _____

R. OWEN
United States District Judge

Dated: July 28, 1983
New York, N.Y.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL., PLAINTIFFS,

against

WILIAM D. RUCKLESHAUS, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

November 29, 1983

JUDGMENT AND ORDER

OWEN, District Judge

Upon consideration of the cross-motions of the parties for summary judgment and the record in this case, judgment is entered as follows:

1. It is hereby ordered, adjudged and decreed that the provisions for the determination of compensation of section 3 (c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended by the Federal Pesticide Act of 1978, 7 U.S.C. § 136a(c)(1)(D) (not including the provisions of section 3(c)(1)(D)(i)), are unconstitutional as a violation of Article III of the Constitution.

2. It is further ordered, adjudged and decreed that defendant William D. Ruckelshaus, as Administrator of the United States Environmental Protection Agency, and his officers, agents, employees and representatives, are hereby permanently enjoined from permitting or implementing any use of data where the submitter's compensation is to be determined under the said

section 3(c)(1)(d), *supra*; provided, however, that notwithstanding the foregoing, any submitter may file a consent to the use of its data in support of a registration or amendment, in which case such registration or amendment shall not be subject to this injunction.

3. It is therefore ordered that to the foregoing extent, plaintiffs' motion for summary judgment is granted.

4. It is further ordered that with respect to plaintiffs' claim as to section 10 of the Federal Insecticide, Fungicide and Rodenticide Act, summary judgment is hereby entered in favor of the defendants and Count I of the amended complaint is dismissed with prejudice.

5. Each party is to bear its own costs.

/s/ _____

R. OWEN

United States District Judge

Dated: November 29, 1983
New York, N.Y.

Judgment Entered 11/30/83

/s/ _____

RAYMOND F. BURGHARDT

Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL., PLAINTIFFS,

against

WILIAM RUCKLESHAUS, ADMINISTRATOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET ANO., DEFENDANTS

[Filed: Dec 21, 1983]

NOTICE OF APPEAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1252, defendants William D. Ruckelshaus, Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency hereby appeal to the United States Supreme Court from so much of a judgment entered in this Court on November 29, 1983, as declared a portion of section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136a(3)(c)(1)(D), unconstitutional and enjoined its enforcement.

RUDOLPH W. GIULIANI
United States Attorney for the Southern District of New York, Attorney for Defendants

Dated: New York, New York
December 21, 1983

By: /s/ _____

MICHAEL H. DOLINGER
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York
Tele. No.: (212) 791-0052

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 1, of the Constitution provides in pertinent part:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The relevant provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. (& Supp. V) 136 *et seq.*, as amended in 1978, provide:

* * * * *

§ 136a(c). Procedure for registration

(1) Statement required

Each applicant for registration of a pesticide shall file with the Administrator a statement which includes—

* * * * *

(D) except as otherwise provided in subsection (c)(2)(D) of this section, if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:

(i) With respect to pesticides containing active ingredients that are initially registered under this subchapter after September 30, 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment

adding any new use to the registration and that pertains solely to such new use, shall not, without the written permission of the original data submitted, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide: *Provided*, That such permission shall not be required in the case of defensive data;

(ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for reregistration, the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the "applicant") within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by aggreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the orginal data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount

and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of the Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings, and the findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator where there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, or other misconduct. The parties to the arbitration shall share equally in the payment of the fee and expenses of the arbitrator. If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the data in support of the application. Notwithstanding any other provision of this subchapter, if the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as re-

quired by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in support of which the data were used without further hearing. Before the Administrator takes action under either of the preceding two sentences, the Administrator shall furnish to the affected person, by certified mail, notice of intent to take action and allow fifteen days from the date of delivery of the notice for the affected person to respond. If a registration is denied or cancelled under this subparagraph, the Administrator may make such order as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide. Registration action by the Administrator shall not be delayed pending the fixing of compensation;

(iii) after expiration of any period of exclusive use and any period for which compensation is required for the use of an item of data under subparagraphs (D)(i) and (D)(ii) of this paragraph, the Administrator may consider such item of data in support of an application by any other applicant without the permission of the original data submitter and without an offer having been received to compensate the original data submitter for the use of such item of data;

(E) the complete formula of the pesticide; and

(F) a request that the pesticide be classified for general use, for restricted use, or for both.

No. 83-1564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., *et al.*,
Appellees.

**On Appeal From The United States District Court
For The Southern District of New York**

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether Congress' delegation of final and conclusive judicial power to a federally appointed arbitrator to adjudicate compensation liability between pesticide registrants under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(c)(1)(D)(ii), without opportunity for substantive review in an Article III court, violates Article III of the Constitution.

2. Whether Congress' delegation of absolute legislative power to a FIFRA arbitrator to determine registrants' compensation liability, without a statutory compensation standard and without substantive review in an Article III court, violates Article I of the Constitution.

3. Whether the district court properly enjoined the use of an owner's research data by competitors to register copycat pesticides with the U.S. Environmental Protection Agency, where the compensation procedure prescribed by FIFRA for the use of his data is unconstitutional.

THE PARTIES

Pursuant to Supreme Court Rule 28.1, the parties and their publicly held parent companies and non-wholly-owned subsidiaries and affiliates are:

Abbott Laboratories

Ciba-Geigy Corporation

Ciba-Geigy Ltd. (Parent)

E. I. du Pont de Nemours & Co.

FMC Corporation

Ataka Construction & Engineering Co., Ltd.
CBV-Industria Mecanica, S.A.

Rhone-Poulenc, Inc.

Rhone-Poulenc S.A. (Parent)

Rohm and Haas Company

The Shipley Company
Advanced Genetic Sciences

Stauffer Chemical Company

Union Carbide Agricultural Products Company, Inc.

Union Carbide Corporation (Parent)
Union Carbide Australia and New Zealand Limited
Union Carbide Canada Limited
Union Carbide Mexicana, S.A. de C.V.

Uniroyal, Inc.

UNIROYAL Industri Turk A.S.
Uniroyal LIMITED (U.K.)

Velsicol Chemical Corporation

Northwest Industries, Inc. (Parent)

Zoecon Corporation

Sandoz Ltd. (Parent)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
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Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., *et al.*,
Appellees.

On Appeal From The United States District Court
For The Southern District of New York

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16, appellees move that the judgment of the district court be affirmed.

STATEMENT OF THE CASE

This case raises the constitutionality, under Article I and Article III, of Congress' delegation of absolute, nonreviewable federal legislative and judicial power to arbitrators to adjudicate compensation disputes between pesticide registrants under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1982).

FIFRA requires that an offer of compensation be made to the owner of original pesticide research data when a

copycat or "me-too" applicant uses the originator's research to register an imitation pesticide product with the U.S. Environmental Protection Agency ("EPA"). The statutory provision in question, section 3(c)(1)(D) of FIFRA (as amended by the Federal Pesticide Act of 1978, Pub. L. No. 95-396, § 2, 92 Stat. 819, 820), vests "final and conclusive" authority in an arbitrator appointed by the Federal Mediation and Conciliation Service ("FMCS") to determine the compensation payment to the data originator and commands that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination."[1]

Appellees are developers and marketers of pesticides. They each invest heavily in innovative and expensive product research and testing, the results of which are submitted to EPA to meet the agency's requirements for the registration of pesticides under FIFRA. Faced with the use of their research data by competitors to obtain copycat registrations from EPA, but lacking a constitutionally valid forum in which to adjudicate the compensation payment that Congress mandated, appellees sought and obtained declaratory and injunctive relief from the district court.

The court declared that FIFRA's arbitrator compensation system on its face violates Article III by vesting "the essential attributes of judicial power" in private arbitrators and by barring Article III courts from making a final determination on issues of fact or law that arise in the compensation dispute. (J.S. App. 14a.) Because an agree-

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[1] The only exception is for fraud, misrepresentation or misconduct by one of the parties or the arbitrator. Section 3(c)(1)(D)(ii) (J.S. App. 20a-22a). References to the government's Jurisdictional Statement and to the appendix thereto are cited as "J. S." and "J. S. App.," respectively.

ment to pay compensation is an express statutory precondition for the use of an originator's data, the district court enjoined such use where compensation is to be determined under the invalid arbitration scheme. (J.S. App. 15a-16a.) EPA appealed the judgment directly to this Court pursuant to 28 U.S.C. § 1252. (J.S. App. 17a.)

Appellees request affirmance of the district court's decision because FIFRA's constitutional infirmity is clear on the face of the statute.

1. FIFRA requires that all pesticides be registered by EPA before they are marketed. FIFRA § 3(a). For registration, the Administrator of EPA must determine that the pesticide will perform its intended function and will be used without causing unreasonable adverse effects on the environment. FIFRA § 3(c)(5). To establish a pesticide's safety and efficacy, FIFRA authorizes EPA to require applicants for registration to perform scientific testing. FIFRA §§ 3(c)(1)(D), 3(c)(2)(A). Under this authority, EPA has promulgated comprehensive testing requirements designed to establish the physical, chemical and biological characteristics of the product.[2]

These government premarket testing requirements impose costly regulatory burdens on innovative companies. By keeping new products off the market for several years so that they can be tested and undergo EPA

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[2] EPA requires the performance of extensive scientific studies to demonstrate the acute and chronic toxicological properties of the pesticide; its effects on fish, wildlife, nontarget insects and microorganisms; the manner in which the product degrades and moves in the environment; residues of the product on food crops; metabolites of the product in plants and animals; physical and chemical characteristics; and efficacy in controlling target organisms. The current testing requirements are contained in EPA's proposed codification of 40 C.F.R. pt. 158, published at 47 Fed. Reg. 53,192 (1982).

review,[3] the regulatory scheme imposes a delay cost on the innovator because of the postponement of income that would be generated from marketing the new product.[4] Each year of regulatory delay can cost the developer tens of millions of dollars and shorten the term of any available patent protection. In addition, the actual cost of testing is high. The industry spent over one-half billion dollars on R&D in 1982 (more than $40 million for each new chemical registered), a substantial part of which is attributable to government testing requirements.[5] The regulatory process forces the innovator to bear great risk and uncertainty: He must invest substantial capital in a research program without knowing whether the results of the testing will be adverse or whether the government will withhold, restrict or delay regulatory approval.[6]

FIFRA allows imitators ("me-too registrants") to satisfy EPA's testing requirements by relying on research performed by the product innovator. FIFRA § 3(c)(1)(D)(ii).[7] Under this provision, the me-too reg-

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[3] For new products registered in 1982, it took an average of nine years after discovery to complete testing and obtain the first full EPA registration (six years for conditional registration). National Agricultural Chemicals Association, 1982 Industry Profile Survey ("NACA Survey") at 7.

[4] Office of Technology Assessment, U.S. Congress, Technological Innovation and Health, Safety and Environmental Regulation, at VIII-47 (1981); The Conservation Foundation, Product Regulation and Chemical Innovation, at IV-33 (1980).

[5] *See* NACA Survey, *supra* note 3, at 7.

[6] *See* Office of Technology Assessment report, *supra* note 4, at VIII-49; Conservation Foundation report, *supra* note 4, at IV-35.

[7] A limited exception to the mandatory data licensing requirement is contained in FIFRA § 3(c)(1)(D)(i) (J.S. App. 19a-20a). This section specifies that data submitted in support of certain new products

istrant gains immediate entry to the market, without delay, testing cost or risk, thereby avoiding the burdens of government regulation borne by the innovator alone. Because of this inequity, and to encourage innovative R&D, FIFRA provides that the original data submitter's research may be used to support the me-too applicant's registration "*only if* the applicant has made an offer to compensate the original data submitter." Section 3(c)(1)(D)(ii) (J.S. App. 20a) (emphasis added).

If the parties do not agree on the terms of compensation, the originator's only recourse is to initiate "binding arbitration" under the auspices of FMCS.[8] The arbitrator appointed by FMCS has final and unreviewable adjudicatory power to determine compensation:

> [T]he findings and determination of the arbitrator shall be final and conclusive, and no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or misconduct by one of the parties to the arbitration or the arbitrator . . . .

Section 3(c)(1)(D)(ii) (J.S. App. 21a).

---

registered after September 30, 1978 may not be relied on by other applicants for a period of ten years. The validity of this provision is not at issue in this appeal. (*See* J.S. App. 15a, para. 1.)

[8] FMCS "is in the business of helping to resolve labor disputes between employers and representative[s] of their employees." It "rarely arranges or conducts arbitration of commercial disputes" and its private labor arbitrators "do not handle commercial disputes arising under FIFRA." 45 Fed. Reg. 55,395 (1980). For this reason, FMCS appoints arbitrators to FIFRA cases from the roster of the American Arbitration Association ("AAA"). 29 C.F.R. § 1440.1 (1983).

The statute provides no standard for the arbitrator to follow in determining compensation.[9] Because of Congress' failure to specify a standard,[10] FIFRA vests in each arbitrator, in each case, unrestricted legislative power to fix a standard and unreviewable judicial authority to apply it.

2. During the pendency of the district court action, research data submitted by appellees to EPA were used to grant me-too registrations to competitors for numerous important products. For example, research data generated by appellee Stauffer Chemical Company were relied on to issue me-too registrations to PPG Industries for two major herbicides invented by Stauffer. These herbicides account for sales of hundreds of millions of dollars in the United States.

Stauffer demanded an arbitration against PPG in April 1982 for compensation on one of the herbicides. *In re Stauffer Chemical Co.* v. *PPG Industries*, No. 16 199 077 82 FIFRA (Am. Arb. Ass'n June 28, 1983). Over Stauffer's vehement objection, FMCS appointed three arbitrators to the case who had been specially trained by EPA on the factors that agency (which Congress had removed from any official role in determining compensation)

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[9] FMCS declined to publish a standard for compensation on the ground that neither FIFRA nor the legislative history "specified a formula or other guidance on the valuation of data for compensation purposes." 45 Fed. Reg. 55,394 (1980); 45 Fed. Reg. 28,105, 28,107 (1980). The district court agreed that "this is a standardless delegation of powers." (J.S. App. 13a.)

[10] Former EPA Administrator Douglas M. Costle requested Congress to establish guidelines for determining compensation, H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974, but Congress did not do so.

thought should control the arbitrators' decision[11]—factors with which Stauffer strongly disagreed.[12] The arbitration decision rendered in June 1983 left Stauffer aggrieved by awarding it a fraction of the amount of compensation claimed. FIFRA barred appeal by Stauffer of the merits of the award.[13]

3. Because appellees were confronted with the continued use of their data by competitors to support me-too registrations, they requested the district court to declare unconstitutional FIFRA's delegation of legislative and judicial powers to arbitrators to decide compensation disputes, and to enjoin the operation of FIFRA's "use provision" insofar as it permitted competitors to rely on an originator's data without providing a constitutionally valid mechanism for obtaining the compensation that the statute requires.[14]

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[11] Memorandum of Law in Support of Defendants' Motion to Dismiss or for Summary Judgment and In Opposition to Plaintiffs' Motion for Summary Judgment, at 86, Union Carbide Agricultural Prod . Co. v. Ruckelshaus, 571 F. Supp. 117 (S.D.N.Y. 1983).

[12] Affidavit of Andrew F. Fink, para. 5 and Exhibits 1 and 2, Union Carbide Agricultural Prod. Co. v. Ruckelshaus, 571 F. Supp. 117 (S.D.N.Y. 1983).

[13] Despite FIFRA's prohibition of judicial review, PPG brought suit to vacate the award. PPG Indus. v. Stauffer Chem. Co., Civ. No. 83-1941 (D.D.C. filed July 7, 1983). Stauffer cross-claimed that the use of its data by PPG was invalid because of the Article III violation.

[14] In the court below, appellees had previously challenged the use provision of section 3(c)(1)(D), as well as the data disclosure provision of section 10 of FIFRA, as a taking of property without just compensation, raising the same issue that is now before the Court in Ruckelshaus v. Monsanto Co., No. 83-196. After the Court of Appeals for the Second Circuit reversed an order granting a preliminary injunction, Union Carbide Agricultural Prod. Co. v. Costle, 632 F.2d 1014 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981), appellees dismissed

Under the authority of this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the district court held on cross-motions for summary judgment[15] that FIFRA's delegation of unreviewable judicial authority to arbitrators violates Article III. (J.S. App. 13a-14a.)

On appellees' claim of an unconstitutional delegation of legislative power to the arbitrators, the district court concluded that appellees "appear correct . . . that this is a standardless delegation of powers . . . utterly without judicial review," but did not rest its decision on that ground alone. (*Id.* at 13a.)

In holding that FIFRA's arbitration scheme violates Article III, the district court recognized that Congress, in accordance with *Northern Pipeline*, possesses substantial discretion to create substantive federal rights and to tailor the manner in which they may be adjudicated, including the assignment to an adjunct of some functions historically performed by judges—provided that the functions of the adjunct are limited in such a way that the essential attributes of judicial power are retained in an Article III court. (J.S. App. 14a.) The district court concluded that "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation." *(Id.)* It found that the arbitration scheme deprives the courts of any role in fact-finding and bars them from considering matters of law arising from the substantive issues in the compensation dispute. "This leaves the courts with no

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their Fifth Amendment claim, reserving the right to refile a taking claim. Appellees amended their complaint and filed a motion for summary judgment raising the Article I and Article III claims presented here.

[15] No fact material to the constitutionality of section 3(c)(1)(D) has been disputed by any party.

power to make any 'informed, final determination' of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III." *(Id.)*

The district court rendered a judgment declaring FIFRA's provisions for determination of compensation unconstitutional as a violation of Article III, and as a result, enjoined the use of a submitter's data where his compensation is to be determined under section 3(c)(1)(D). (J.S. App. 15a-16a.)[16]

THE QUESTION PRESENTED WAS CORRECTLY RESOLVED BY THE DISTRICT COURT

In enacting the arbitrator compensation scheme of FIFRA, Congress unconstitutionally delegated plenary legislative and judicial power to arbitrators appointed by the Executive Branch. The statute merges executive, legislative and judicial powers in violation of the Constitution. The Executive Branch appoints the arbitrators, who are vested with the absolute legislative power to set compensation on a case-by-case basis, and the nonreviewable judicial power to adjudicate compensation liability. FIFRA thus violates the principle of separation of powers that is at the core of the Constitution's grant of Article I and Article III authority.

Appellees have been harmed by this scheme because they have no constitutional forum available in which they

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[16] In a second count of their complaint, appellees also challenged FIFRA's grant of authority to EPA to disclose trade secret information on the ground that it effects a retroactive deprivation of property rights without due process of law. The district court found that the statute's withdrawal of trade secret protection did not violate due process requirements regardless of whether it upset settled expectations. (J.S. App. 9a.) That issue is not before the Court in this case.

can obtain the statutory compensation that Congress required they be paid as a condition for the use of their research data by competitors to register me-too products. Appellees' right to adjudicate their compensation claims in a constitutionally valid tribunal is violated by this scheme.

The district court properly granted a judgment declaring FIFRA's arbitrator compensation scheme unconstitutional and enjoining any use of data that is conditioned upon the unconstitutional compensation determination. The constitutional flaws in the use-compensation system cannot be cured by severing any portion of it. Legislative action is necessary to bring the compensation scheme into conformity with the requirements of Article I and Article III.

The judgment of the district court should be affirmed.

I. THIS CASE IS PROPERLY BEFORE THE COURT

A. The Court's Decision In *Ruckelshaus v. Monsanto* Cannot Dispose Of This Case

The government suggests that this case can be disposed of summarily in accordance with the Court's forthcoming decision in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (argued Feb. 27, 1984). (J.S. 7, 13.) This self-serving tactic attempts to blur the major distinctions between the *Union Carbide* and *Monsanto* cases and prompt the Court to reverse the district court without a hearing on the merits of the appeal. According to the government, "[a]ll the issues presented here [in *Union Carbide*] are also under consideration in *Monsanto*." (*Id.* at 7.) In reality, the constitutional issue raised by *Union Carbide* is entirely different from and wholly independent of the question involved in *Monsanto*.

The issue in *Union Carbide* is whether the use of data under FIFRA § 3(c)(1)(D) should be enjoined because the statute's arbitrator compensation scheme violates Article I and Article III of the Constitution. That question is *not* before the Court in *Monsanto*. There, the Court is asked to decide whether FIFRA's use and disclosure of data effect a taking of property in violation of the Fifth Amendment. The Court in *Monsanto* is *not* called upon to review the constitutionality of FIFRA's arbitrator compensation scheme under Articles I and III. Regardless of the Court's ruling on the Fifth Amendment claim in *Monsanto*, the constitutionality of the arbitrator compensation scheme under Articles I and III will remain a separate, unresolved issue ripe for review in this case.

The arbitrator compensation scheme is not at issue in *Monsanto* because the government conceded there that FIFRA's "compensation scheme was not meant to provide . . . 'just compensation' within the meaning of the Fifth Amendment." Jurisdictional Statement at 25, *Ruckelshaus* v. *Monsanto Co.*, No. 83-196. Thus, if the Court determines in *Monsanto* that FIFRA's use of data effects a taking, there is no dispute as to the failure of FIFRA to provide just compensation.[17]

Both parties in *Monsanto* are in agreement that the issue of the constitutionality of the arbitrator compensation system is not properly before the Court in that case. *See* Brief of Appellee Monsanto Company at 40 n.56; Brief for the Appellant at 44-45. As a result, because a "constitutional question . . . must be presented in the context

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[17] When the *Monsanto* case reached this Court, EPA conceded for the first time that the FIFRA arbitration provision does not provide just compensation. Because EPA had not conceded this point earlier, the district court ruled on the question of whether the arbitration provision satisfied the Fifth Amendment. *See* Monsanto Co. v. Acting Adm'r, EPA, 564 F. Supp. 552, 566-67 (E.D. Mo. 1983).

of a specific live grievance," the Court cannot review the Article I and Article III issues there. *See Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). Appellant's suggestion, therefore, that *Union Carbide* can be summarily disposed of by *Monsanto* is devoid of merit and disingenuous. The Court should rule on the issue raised by EPA's appeal in *Union Carbide*—the constitutionality of the arbitrator compensation scheme under Articles I and III—either by granting appellees' Motion to Affirm or by noting probable jurisdiction and deciding this case following briefing and argument on the merits.

B. Appellees' Claims Are Ripe

The district court correctly concluded that appellees' challenge to FIFRA's use-compensation system is ripe. (J.S. App. 10a n.2.) It is ripe for two reasons:

(1) The issues are fit for judicial decision—the constitutionality of the arbitrator compensation scheme is purely a question of law, and the government has not disputed any fact material to that issue.

(2) Appellees are suffering economic harm because their research data have been used by competitors to register copycat products, and they do not have a constitutionally valid forum in which to adjudicate the compensation payment that Congress mandated. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). Appellees' "personal right . . . to demand Article III adjudication" of the federal compensation claim therefore is infringed. *Pacemaker Diagnostic Clinic of America* v. *Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc).

In alleging that the statute inflicts no harm on appellees, and that appellees' injury is "speculative" in the absence of an arbitration award (J.S. 8), the government

completely misperceives the gravamen of appellees' complaint. Appellees already have experienced severe economic loss because of the "me-tooing" of their products without a viable forum in which to obtain statutory compensation. In the absence of the district court's injunction, appellees would continue to suffer injury as more of their research is used by me-too registrants, while being unable to adjudicate the compensation they are owed in a constitutionally valid tribunal. Thus, as the district court held below, whether an arbitration has been completed has no bearing on ripeness:

> [I]t is not the results of any arbitration procedure that plaintiffs protest, or even the internal procedure thereof, rather *it is the statutory compulsion to seek relief through arbitration* to the exclusion of any other mechamism. *That issue is clearly ripe for resolution.*

(J.S. App. 11a n.2) (emphasis added).[18]

The district court found that there is nothing to be gained by delaying adjudication of appellees' constitutional claims (J.S. App. 11a n.2) because the issue is a "purely legal one." *Abbott Laboratories* v. *Gardner*, 387

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[18] The Court's decision in Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979), supports the district court's finding of ripeness. ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Id.* at 298.) Unlike the situation in *Babbitt*, the arbitration process has been triggered because appellees here have had their research data me-too'd and are now compelled to seek compensation through the unconstitutional arbitration scheme. In *Babbitt*, the arbitration remedy was not ripe because the preconditions for arbitration (an employees' strike followed by an application by the employer for a temporary restraining order) had not been met. *Id.* at 305. Moreover, in that case the district court raised the constitutionality of the arbitration provision *sua sponte*; the union "never contested the constitutionality of the arbitration clause." *Id.*

U.S. 136, 149 (1967). The Court would be "in no better position later than [it is] now to decide this question." *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 82 (1978) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 145 (1974)).

Finally, even if actually having to endure an unconstitutional arbitration proceeding were a prerequisite to ripeness, one of the appellees, Stauffer Chemical Company, already has done so. Under FIFRA, no appeal from that decision is possible. Indeed, Stauffer has met all of the conditions itemized by the government as a purported prerequisite to ripeness. (J.S. 8.) Therefore, even under the government's test, this action is ripe.[19]

II. FIFRA'S ARBITRATOR COMPENSATION SCHEME IS UNCONSTITUTIONAL

A. The Delegation Of Nonreviewable Judicial Power To Arbitrators Violates Article III

Article III, Section 1, of the Constitution commands that the judicial power of the United States be exercised by judges who have the protections prescribed by that article: life tenure and nondiminishable compensation.

The district court correctly found that the arbitrator compensation provision of FIFRA violates this constitutional mandate by assigning "the judicial power of the United States" to arbitrators whose compensation

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[19] In Ruckelshaus v. Monsanto, No. 83-196, the parties agreed that the Article III issue was not ripe because the government had conceded that the FIFRA compensation scheme was not meant to provide "just compensation" within the meaning of the Fifth Amendment. *See* discussion *supra* at 11. The constitutionality of the compensation scheme under Article III simply was not an issue in that case. Thus, the parties' stipulation in that case has no bearing on this appeal.

and selection in each case are subject to the Executive's control. The arbitrator is given plenary power to adjudicate the liability of one individual to compensate another under federal law. He is not a fact-finding adjunct to a federal judge; instead, he has been vested by Congress with the "final and conclusive" authority to decide all questions of law and fact. The scheme does not retain the "essential attributes of judicial power" in Article III courts, but to the contrary, specifies that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination." Section 3(c)(1)(D)(ii). Without any purported justification, or any apparent thought given to the adverse constitutional ramifications, Congress has devised a scheme which violates the principles of separation of powers and judicial impartiality that are at the heart of Article III.

In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that the assignment by Congress to non-Article III bankruptcy judges, under the Bankruptcy Act of 1978, of the judicial power to adjudicate Marathon's liability to Northern, violates Article III. *Id.* at 87, 91. The plurality opinion in *Northern Pipeline* stated that Article III prohibits Congress from vesting jurisdiction in Article I legislative courts to decide matters of "private rights"—specifically, "the liability of one individual to another under the law as defined." *Id.* at 69-70. Although Congress may create Article I tribunals to act as fact-finding adjuncts to constitutional courts for the adjudication of substantive federal rights, the "essential attributes of judicial power" must be reserved in the Article III courts themselves. *Id.* at 81.

The district court here concluded that "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation" (J.S. App. 14a):

> The use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters. The courts play no role in fact-finding. More importantly, however, they are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding. Rather, their powers are limited to review for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator." This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III.

(Id.) The government virtually concedes that the statute is unconstitutional without full judicial review. (J.S. 12.)

As in *Northern Pipeline*, the rights at issue here are "private rights," because they involve "the liability of one individual to another under the law as defined." *Northern Pipeline*, 458 U.S. at 69-70. The "public rights" doctrine does not apply here. That doctrine applies only to cases in which the government is a party to the dispute. *Id.* at 67-68, 69-70. Here the government is not a party to the arbitration.

The government's faulty assertion that substantive federal rights need not be adjudicated in accordance with Article III—a privilege it would reserve only for "traditional common law rights" (J.S. 11)—is defeated by *Northern Pipeline*. Although the plurality opinion in *Northern Pipeline* recognizes that Congress has discretion to prescribe the manner in which federal statutory rights are adjudicated, and may assign some functions to an adjunct, the opinion makes clear that the functions of the adjunct must be limited in such a way that the essential attributes of judicial power are retained in Article III

courts. 458 U.S. at 80-81.[20] Here the essential attributes of judicial power plainly are not.

In *Crowell* v. *Benson*, 285 U.S. 22 (1932), the Court ruled that the adjudication of federal statutory rights is subject to Article III requirements. "*Crowell* involved the adjudication of congressionally created rights" concerning compensation between employers and employees under a federal statute. *Northern Pipeline*, 458 U.S. at 78. The adjudication in *Crowell* was held to be "one of private right," subject to Article III. 285 U.S. at 51. The Court found the adjunct scheme in *Crowell* consistent with Article III because "[t]he agency was thus left with the limited role of determining 'questions of fact,' " and "every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be 'in accordance with law' and supported by evidence in the record." *Northern Pipeline*, 458 U.S. at 78 (citing *Crowell*, 285 U.S. at 44-45, 48). The Court upheld the compensation scheme "in view of these limitations upon the Compensation Commission's functions and powers." 458 U.S. at 78.

No comparable limitations apply to the FIFRA arbitration scheme. It is an adjudicatory device that is especially abhorrent to the values that Article III was intended to further: "a guarantee of judicial impartiality" and "the checks and balances of the constitutional structure." *Northern Pipeline*, 458 U.S. at 58. Under FIFRA, the arbitrator who adjudicates compensation is uniquely be-

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[20] See also Justice White's dissenting opinion:

> There are, I believe, two separate grounds for today's decision. . . . Second, *regardless of the source of the law that governs the controversy*, Congress is prohibited by Art. III from establishing Art. I courts, with three narrow exceptions.

Northern Pipeline, 458 U.S. at 94 (White, J., dissenting) (emphasis added).

holden to the Executive Branch. He is dependent upon the Executive agency, FMCS, for his appointment to every case.[21] His compensation is subject to the Executive's control.[22] Only arbitrators who have submitted to "training" by an Executive agency, EPA, on the compensation factors it believes appropriate are permitted to serve.[23] No statutory standard limits the arbitrator's discretion, nor can any court set the decision aside, even if it is arbitrary, unsupported by the record, or contrary to law.

The government's principal defense for this scheme is to argue that binding arbitration of statutorily created entitlements does not offend any requirement of procedural due process. (J.S. 10.) This proposition is irrelevant. Like the bankruptcy court system struck down in *Northern Pipeline*, FIFRA's arbitrator compensation scheme clearly contravenes Article III, whether or not it offends due process as well.

The government cannot cite a single decision, by this Court or by any other, which has upheld an assignment of unreviewable judicial power to a non-Article III tribunal to adjudicate liability between individuals under federal law, without statutory standards and without an opportunity for substantive review in an Article III court.

B. FIFRA's Delegation Of Absolute Legislative Power To Arbitrators Violates Article I

Article I, Section 1, of the Constitution vests "all legislative powers" in the Congress of the United States.

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[21] Section 3(c)(1)(D)(ii) gives FMCS the authority "to appoint an arbitrator" for each dispute.

[22] FMCS delegated the initial authority to fix the arbitrator's compensation to the AAA and retained final decision-making authority. 29 C.F.R. § 1440.1; 29 C.F.R. pt. 1440 app. §§ 41, 42 (1983).

[23] *See* discussion *supra* at 6-7.

If the constitutional principle of separation of powers is to retain its vitality, FIFRA's delegation of absolute legislative power to arbitrators must be struck down. As the district court found, "this is a standardless delegation of powers . . . utterly without judicial review." (J.S. App. 13a.)

FIFRA says nothing more than that the me-too applicant must "compensate" the data originator. Section 3(c)(1)(D)(ii). Congress has abdicated its responsibility to set compensation standards to an ad hoc group of politically nonresponsive arbitrators, appointed by FMCS individually to each dispute, each of whom has unfettered discretion to apply arbitrarily any compensation standard he may fancy. Each individual arbitrator has final and conclusive power to make the important social policy choice on which Congress defaulted: how a product innovator who bears the brunt of government-mandated testing and regulation should be compensated when competitors use his research to market generic imitations of his product. The choices before the arbitrator—whether to base compensation on the fair market value of the use of the data, on the impact of regulation on the innovator, on the replacement cost of the research data, or on some other theory—implicate a wide range of socioeconomic values concerning incentives for innovation and competition policy.

The delegation under FIFRA is unprecedented. Appellees know of no instance in which Congress has sought *both* to impose a completely standardless delegation of legislative power *and* to bar the courts from any substantive review of the delegatee's exercise of the power. Unlike other cases in which broad delegations have been upheld, here no necessity has been shown either for the absence of an "intelligible principle" to guide the

arbitrator's exercise of discretion or for the preclusion of court review "to test that exercise against ascertainable standards."[24] *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). *See also INS* v. *Chadha*, 103 S. Ct. 2764, 2785 n.16 (1983). There are no precedents to guide the arbitrator because each arbitration is *sui generis*. *Compare Lichter* v. *United States*, 334 U.S. 742, 783 (1948). Because each arbitrator is appointed on a case-by-case basis, the delegatee has no residual authority or opportunity to develop continuity of policy. *Compare United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

FIFRA's delegation is an affront to the Constitution's separation of powers. If this delegation can be sustained, the principle of separation of powers has become meaningless. Appellees ask that this egregious deviation from the system of checks and balances established by the Constitution be corrected so that appellees' right to a constitutionally proper determination of compensation for use of their data can be vindicated.

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[24] Indeed, former EPA Administrator Douglas Costle stated during hearings on the 1978 FIFRA amendments that EPA "lacks expertise" in determining compensation and asked Congress to "make more explicit what factors it feels are pertinent in determining reasonable compensation." H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974.

III. THE RELIEF GRANTED BY THE DISTRICT COURT WAS PROPER

A. The District Court Correctly Enjoined The Use Of Data Subject To The Invalid Arbitrator Compensation Scheme

Having found FIFRA's arbitrator compensation scheme unconstitutional, the district court permanently enjoined EPA "from permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D)." (J.S. App. 15a, para. 2.) This relief was proper because the statute plainly states that the use of data is predicated upon and inseparable from the procedure for obtaining compensation.

Section 3(c)(1)(D)(ii) authorizes a me-too applicant to rely upon an originator's data "*only* if the applicant has made an offer to compensate" (emphasis added). Furthermore, the statute provides that "the right to compensation [is] for the use of the data." *Id.* Thus, FIFRA establishes an inextricable link between the compensation procedure and the use of data.

Congress' basic purpose in requiring compensation was to prevent "just plain stealing" the use of data. *Federal Environmental Pesticide Control Act: Review of FEPCA Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 11 (1973) (statement of Rep. Poage, Chairman, House Committee on Agriculture). As a result, Congress would not have permitted the use of data in the absence of a procedure for obtaining compensation. This was confirmed by Senator Patrick Leahy, a principal sponsor of the arbitration provision:

> [W]e are not allowing free use of . . . data by competitors. If a registrant wishes to use the data generated by another company to support their registra-

> tion then he must pay compensation for the data . . . .

123 Cong. Rec. 25,706 (1977). Congress viewed compensation as the *quid pro quo* for authorizing the use of data. Accordingly, the use-compensation system was enacted as "a single statutory grant of jurisdiction" which cannot be severed. *See Northern Pipeline*, 458 U.S. at 87 n.40.

Permitting the use of data in the absence of a procedure for obtaining compensation would have provided me-too registrants the "free ride" which Congress intended to prevent. *See* S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4023, 4091-92. For this reason, the district court's injunction against the use of data effectuated rather than contravened congressional intent. *See Sathon, Inc.* v. *American Arbitration Association*, No. 83 C 6019, slip op. at 6, 9 n.6 (N.D. Ill. Mar. 30, 1984), *appeal docketed*, No. 84-1540 (7th Cir. Apr. 6, 1984) (me-too registrant estopped from challenging duty to arbitrate after using another company's data to obtain me-too registration). Enjoining the use of data, therefore, was the only proper relief the district court could have granted.

B. The Relief Proposed By The Government Is Inappropriate

The government's simplistic proposal is to "save" the unconstitutional arbitrator compensation system by striking the statute's no-review clause. (J.S. 12-13.) That clause, however, is intrinsic to and inseparable from the arbitrator compensation scheme enacted by Congress. Furthermore, striking the clause would not cure the statute. No right of review would arise, much less the "full judicial review" assumed by the government. (*Id.* at 12.) The Court would have to overstep its judicial role and engage in lawmaking to construct an arbitrator compen-

sation scheme that conforms to the requirements of Article I and Article III.

Whether the no-review clause can be severed from the arbitrator compensation provision is a question of congressional intent. *See United States* v. *Jackson*, 390 U.S. 570, 586 (1968); *Lynch* v. *United States*, 292 U.S. 571, 586 (1934); *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). According to the government, "there is nothing in the legislative history to suggest that Congress would have failed to enact the [arbitrator compensation] provision without such a limitation [on judicial review]." (J.S. 12.) To the contrary, the legislative history clearly indicates that Congress' very purpose in restructuring section 3(c)(1)(D) in 1978 was to remove the determination of compensation from the realm of the judiciary. The no-review clause was an integral part of this congressional scheme.

Prior to 1978, compensation was determined by EPA in adjudicatory proceedings and was appealable to the federal district courts. *See* FIFRA § 3(c)(1)(D), Pub. L. No. 92-516, sec. 2, 86 Stat. 973, 979-80 (as enacted in 1972); FIFRA § 3(c)(1)(D), Pub. L. No. 94-140, sec. 12, 89 Stat. 751, 755 (as revised in 1975). In 1977 EPA Administrator Douglas M. Costle explained to Congress that the agency lacks the expertise to judge compensation. H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974. As a result, Congress decided to abandon the administrative/judicial system of compensation that had been in effect since 1972. Senator Leahy explained that determining compensation "[should] *not require active governmental involvement* . . . [and] should be determined to the fullest extent practicable, *within the private sector*." 123 Cong. Rec. 25,710 (1977) (emphasis added). To effectuate this scheme, Congress deliberately removed EPA from any

substantive role in the determination of compensation. Adjudicatory power was vested in private arbitrators, whose findings and determinations were made "final and conclusive" and not subject to review. FIFRA § 3(c)(1)(D)(ii).

The no-review clause, therefore, is an inextricable part of the compensation scheme. Striking the no-review clause would defeat the congressional purpose of reassigning the determination of compensation to private arbitrators. Congress would not have intended that scheme to stay in force absent a no-review clause. As a result, the clause is not severable from the remainder of the arbitrator compensation system.[25]

The government baldly asserts that "the only appropriate relief would be to strike down the limitation on review by an Article III court, since there can be no doubt that the scheme would be constitutional *so long as full judicial review was available.*" (J.S. 12 (emphasis added).) Nowhere does appellant explain why or how a right to "full judicial review" would be created by striking the no-review clause.

"The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U.S.

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[25] FIFRA's "severability" provision, 7 U.S.C. § 136x (1982), is not a blanket authorization to fragment otherwise indivisible provisions of the Act. A severability provision does not take precedence over congressional intent to keep a statutory provision intact. FIFRA's severability provision states that the invalidity of one provision of the Act "shall not affect other provisions . . . *which can be given effect without regard to the invalid provision.*" FIFRA § 30 (emphasis added). That is not the case with § 3(c)(1)(D). Because Congress intended determination of compensation to be a private matter, the arbitration scheme enacted by Congress in 1978 cannot be given effect without regard to the no-review clause.

287, 297 (1981). In view of the clear congressinal intent in 1978 to *remove* EPA and the courts from any role in judging compensation, a cause of action for review of FIFRA arbitration awards cannot be implied in section 3(c)(1)(D). Furthermore, no other section of FIFRA creates a right of review, and no right of review can be implied in any other federal law.

Even if striking the no-review clause were to give rise to some indeterminate form of judicial review, that in itself would not satisfy the requirements of Article III. *See Northern Pipeline*, 458 U.S. at 86-87 n.39. The district court in this case found that the "absolute assignment of power to arbitrators [under section 3(c)(1)(D)] is an impermissible intrusion on the judiciary." (J.S. App. 13a-14a.) Thus, in the case of section 3(c)(1)(D), the "constitutional requirements for the exercise of the judicial power" are *not* met "at all stages of adjudication." *(Id.)* As a result, merely striking the no-review clause would not cure this fatal defect of the arbitrator compensation system.

Further, striking the no-review clause would not supply the standards that are needed to guide the arbitrator's discretion, or a structure that would assure consistency and continuity. It would not cure the Article I violation.

It is axiomatic that Congress, not the courts, has the power to legislate. But legislate is precisely what this Court would have to do to "save" the statute. (*See* J.S. 13.) The Court would have to totally restructure the statutory use-compensation system. Specifically, the Court would have to decide whether arbitrators should continue to be utilized in the determination of compensation, and if so, how to delineate their role so as to not offend Article III. Furthermore, in formulating a new

compensation scheme, the Court would have to decide which Article III courts should be vested with jurisdiction over compensation, and how to circumscribe their authority so as to ensure that they will exercise all the essential attributes of judicial power. Finally, to satisfy Article I, the Court would have to promulgate the standards that should be used to determine compensation. Clearly, these are decisions for Congress and not the Court.

Restructuring the arbitrator compensation system cannot be accomplished through statutory interpretation. Legislative discretion must be exercised in devising a new statutory scheme. In its discretion, Congress very well may choose an approach radically different from the current compensation system. The demonstrated congressional willingness in 1978 and again in 1982 to fundamentally alter the statute underscores the need for the Court to defer to the discretion of Congress and thereby preserve the separation of powers.[28]

The Court, therefore, should limit its role in this appeal to affirming the district court's judgment.

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[28] In 1982 the House of Representatives, joined by the Senate Committee on Agriculture, Nutrition and Forestry, approved legislation that would have elminated the compensation system altogether, in favor of other types of research incentives. *See* S. Rep. No. 551, 97th Cong., 2d Sess. 9 (1982).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: May 29, 1984

No. 83-1564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY, INC., *et al.*,
Appellees.

On Appeal From The United States District Court For The Southern District of New York

SUPPLEMENTAL BRIEF OF APPELLEES

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On Appeal From The United States District Court
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SUPPLEMENTAL BRIEF OF APPELLEES

This supplemental brief is filed to demonstrate that under the Court's decision in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), this case is ripe.

1. In *Ruckelshaus* v. *Monsanto*, the Court held that Monsanto's Fifth Amendment challenge to the constitutionality of FIFRA's arbitration and compensation scheme was not ripe. Slip op. at 31. The lack of ripeness stemmed from the availability of a Tucker Act remedy to redress the taking of Monsanto's property.

The Court found that for any taking that occurred, Monsanto had a remedy under the Tucker Act. Because the Tucker Act was available to supply just

compensation—and Monsanto thus did not have to depend on FIFRA to obtain just compensation—it was not necessary for the Court to decide whether FIFRA's arbitration and compensation scheme satisfied the Fifth Amendment's just compensation requirements. *Id.* The Court concluded, "Because we hold that the Tucker Act is available as a remedy for any *uncompensated taking* Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA, we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution." Slip op. at 30-31 (emphasis added).

The instant case is not brought under the Taking Clause. Consequently, *the Tucker Act has no bearing on the issues in this appeal:* (1) whether FIFRA's delegation of judicial and legislative powers to arbitrators violates the Constitution's separation of powers; and (2) whether the use of an owner's data should be enjoined where the arbitration and compensation scheme mandated by FIFRA is unconstitutional. For this reason, the ripeness ruling in *Monsanto* has no effect on this case.*

2. This case is ripe because appellees have been harmed—and more importantly *will* be harmed—by FIFRA's use-compensation system. *Appellees' principal complaint is with EPA's use of their data.* The government does not dispute that appellees' data have been used to grant me-too registrations to competitors. Nor does it dispute that EPA will continue to use their data for this

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*Furthermore, the availability of the Tucker Act cannot cure the Article I and III defects in the arbitration-compensation scheme because the category of data subject to FIFRA compensation adjudications is far broader than the narrow category of data to which the Tucker Act remedy applies under the *Monsanto* decision (data submitted betwen October 2, 1972 and September 30, 1978).

purpose, in the absence of the injunctive relief granted by the district court. Therefore, it is ripe for this Court to decide whether EPA's use of data was properly enjoined, where the compensation scheme imposed by FIFRA as a condition for data use is unconstitutional under Articles I and III.

3. Even under the ripeness criteria applied to Monsanto's Taking Clause challenge—criteria which we contend are not relevant here—this case is ripe because appellee Stauffer Chemical Company has endured an unconstitutional arbitration and is aggrieved by the result. Appellees established in the district court as part of their summary judgment motion (and the government did not dispute) that Stauffer's data were used by EPA under FIFRA to grant me-too registrations to PPG Industries. As a result of that use, an arbitration award was made to Stauffer for a fraction of the amount of compensation claimed. *In re Stauffer Chemical Co.* v. *PPG Industries*, No. 16 199 077 82 FIFRA (Am. Arb. Ass'n June 28, 1983). The arbitration thus left Stauffer aggrieved, but FIFRA expressly precluded judicial review of the merits of the award.

The district court, noting that appellees were not complaining of the result of any specific arbitration, held that FIFRA's arbitration and compensation scheme is unconstitutional, and consequently enjoined any use of

data conditioned on such compensation payments. Even under the criteria applied to Monsanto's taking claim (slip op. at 31), this holding is clearly ripe for review.

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No. 83-1564

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR THE APPELLANT

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TABLE OF AUTHORITIES

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1. Appellees have mischaracterized the relationship between this case and *Ruckelshaus* v. *Monsanto Co.*, No. 83-196. In each case the lower court held that the arbitration provisions of FIFRA, § 3(c)(1)(D), 7 U.S.C. 136a(c)(1)(D), are unconstitutional and enjoined the operation of the statute. The government contends in both cases that the constitutionality of the arbitration provision is not ripe for review because neither Monsanto nor any of the parties here complains that a completed arbitration has

caused any injury[1] (83-196 Gov't Br. 44-47; 83-1564 J.S. 8-10). The only party in either case to allege that it has participated in an arbitration is Stauffer Chemical Co., an appellee here. But, as we have explained (83-1564 J.S. 9 n.5, 10 n.6), this has no bearing on ripeness because Stauffer has never challenged the outcome of that arbitration. In fact, when its opponent filed a lawsuit contesting the arbitration award, Stauffer counterclaimed for enforcement of the award. *PPG Industries, Inc.* v. *Stauffer Chemical Co.*, Civil Action No. 83-1941 (D.D.C. filed July 7, 1983).

Accordingly, the only difference between the two cases is that Monsanto concedes that the issue is not ripe, while appellees in this case do not. This Court's ruling on the ripeness question in *Monsanto*, therefore, should control here.

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[1] Contrary to appellees' representations, the lack of ripeness in *Monsanto* has nothing to do with any "concession" made by the government in this Court. Appellees state incorrectly that "[w]hen the *Monsanto* case reached this Court, EPA conceded for the first time that the FIFRA arbitration provision does not provide just compensation" (Mot. to Aff. 11 n.17). To the contrary, EPA has argued consistently that FIFRA arbitrations were not intended to provide a Fifth Amendment "just compensation" remedy. In its Memorandum in Support of Defendant's Motion for Summary Judgment and Accompanying Memorandum, *Monsanto Co.* v. *Costle*, Civil Action No. 79-0366-C(1) (E.D. Mo. filed July 16, 1980), well before the trial in that case, EPA stated (at 45): "[T]here is nothing in FIFRA or its legislative history which demonstrates that Congress intended to withdraw the Tucker Act remedy in cases such as this one. Indeed, the compensation provided under Section 3(c)(1)(D)(ii) was not even intended to be 'just compensation' in the Fifth Amendment sense." The district court in *Monsanto* thus was apprised of EPA's consistent and long-held position on this issue.

2. Appellees also argue (Mot. to Aff. 18-20) that their improper delegation of legislative authority claim, which was not adjudicated below, would sustain the injunction and was not presented in *Monsanto*. Both contentions are in error. Appellees claim that Congress failed to provide standards for measuring the compensation due under the statute. The district court in *Monsanto* accepted this contention and made it the basis for a holding that the statute was unconstitutionally vague (83-196 J.S. App. 34a). The government's brief fully refuted this argument (83-196 Gov't Br. 48), by showing that the legislative history evidences Congress's awareness and confirmation of the pre-existing standard—the recovery of an equitable share of the data development costs—for the statutorily-required compensation. This standard is sufficiently clear to defeat the Article I claim presented here.

3. Finally, appellees' arguments against severability of the limitation on judicial review are insubstantial. Indeed, the legislative history cited by appellees (Mot. to Aff. 21-23) shows that Congress's primary purpose in revamping the compensation procedures was to relieve EPA of the job of making compensation determinations because this task was outside the agency's traditional expertise. To achieve this aim, Congress chose a more suitable vehicle—commercial arbitration. Quite obviously, the limitation on judicial review is not central to the purpose behind the amended statute. Moreover, there is no indication that Congress, had it suspected any Article III infirmity, would have eliminated the entire scheme rather than permit greater judicial review.

FIFRA's severability provision, 7 U.S.C. 136x, plainly applies to the limitation on judicial review.[3]

Therefore, even if there were merit to appellees' Article III claims, any constitutional defect would be fully cured by striking the limitation on judicial review. In that event, appellees would retain a federal cause of action to review an arbitration award since the validity of an award is a federal question over which a district court has subject matter jurisdiction. 28 U.S.C. 1331. See *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979).

For these reasons and those stated in the Jurisdictional Statement, this case should be disposed of in accordance with the decision in *Ruckelshaus* v. *Monsanto Co.*, No. 83-196.

Respectfully submitted.

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Solicitor General

JUNE 1984

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[3] Appellees' reliance (Mot. to Aff. 22) on *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87 n.40 (1982), is misplaced. The Bankruptcy Act, the statute under review in *Northern Pipeline*, had no severability clause. Pub. L. No. 95-598, 92 Stat. 2549-2688.

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